

No. 210770

IN THE SUPREME COURT OF VIRGINIA

TREY ADKINS, ET AL.,

Petitioners,

v.

VIRGINIA REDISTRICTING COMMISSION, ET AL.,

Respondents.

**RESPONSE BRIEF FOR THE VIRGINIA
REDISTRICTING COMMISSION AND
ITS SIXTEEN MEMBERS**

J. GERALD HEBERT
Virginia State Bar No. 38432
J. GERALD HEBERT PC
191 Somerville Street, #405
Alexandria, VA 22304
Tel: (703) 628-4673
Fax: (202) 736-2222
hebert@voterlaw.com

H. CHRISTOPHER BARTOLOMUCCI
Virginia State Bar No. 37884
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Tel: (202) 787-1060
Fax: (202) 776-0136
cbartolomucci@schaerr-jaffe.com

KAREEM CRAYTON
CRIMCARD CONSULTING SERVICES
6925 Oakland Mills Road, #613
Columbia, MD 21045
Tel: (334) 245-9763
Fax: (859) 780-5850
kareem@crimcardconsulting.com
(*Pro hac vice* admission pending)

BRYAN P. TYSON
TAYLOR ENGLISH DUMA, LLP
1600 Parkwood Circle, Suite 200
Atlanta, GA 30339
Tel: (678) 336-7249
Fax: (770) 434-7376
btyson@taylorenghish.com
(*Pro hac vice* admission pending)

Counsel for The Virginia Redistricting Commission, George L. Barker, Mamie E. Locke, Ryan T. McDougle, Stephen D. Newman, Les R. Adams, Delores L. McQuinn, Margaret B. Ransone, Marcus B. Simon, Mackenzie K. Babichenko, Greta J. Harris, James Abrenio, Jose A. Feliciano, Jr., Richard O. Harrell, III, Brandon Christopher Hutchins, Sean S. Kumar, and Virginia Trost-Thornton

SEPTEMBER 1, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTRODUCTION..... 1

BACKGROUND AND HISTORY OF THE COMMISSION.....2

ARGUMENT 5

 A. The Commission Takes No Position in This Case.....6

 B. Because the Virginia Constitution Sets Tight Deadlines on the
 Commission’s Work, This Court Should Act Quickly..... 7

CONCLUSION9

CERTIFICATE OF WORD COUNT 11

CERTIFICATE OF SERVICE..... 12

TABLE OF AUTHORITIES

Cases

<i>Button v. Day</i> , 208 Va. 494 (1968).....	7
<i>Goldman v. State Bd. of Elections</i> , No. 201067, 2020 WL 5498497 (Va. Sept. 9, 2020).....	2
<i>Roanoke v. Sutherland</i> , 159 Va. 749 (1933).....	9

Constitutional Provisions

Va. Const. art. II, § 6-A(b).....	2, 3
Va. Const. art. II, § 6-A(d).....	3, 4, 7
Va. Const. art. II, § 6-A(e).....	4, 5
Va. Const. art. XII, § 1.....	2

Statutes

13 U.S.C. § 141(c).....	8
Ch. 1071, 2020 Va. Acts.....	2
Va. Code § 24.2-304.04(9).....	8
Va. Code § 24.2-314.....	4, 8
Va. Code § 30-397(B).....	7

Other Authorities

Henry L. Chambers Jr., <i>The Fight Over the Virginia Redistricting Commission</i> , 24 Rich. Pub. Int. L. Rev. 81 (2021).....	1
--	---

INTRODUCTION

Ten years ago, the General Assembly faced “particularly intense” partisan battles as the House of Delegates and the Senate drew their electoral maps. Henry L. Chambers, Jr., *The Fight Over the Virginia Redistricting Commission*, 24 RICH. PUB. INT. L. REV. 81, 82–83 (2021). Those fights prolonged the redistricting process for congressional seats by more than a year, and once a map finally was approved, that map was immediately challenged, as were the maps for the House of Delegates and the Senate. *Id.* at 83–84. The result, for all involved, was uncertainty: What would Virginia’s districts look like when the dust settled?

Last year, Virginians created the Virginia Redistricting Commission as a bipartisan body of citizens and legislators in an effort to avoid that uncertainty moving forward. Consistent with its bipartisan structure and purpose, the Commission takes no position on the Petition for Writ of Mandamus at issue here. Rather than taking a side in this case, the Commission merely asks this Court to resolve the mandamus proceeding quickly to allow the Commission to meet the tight deadlines for drawing the districts that will serve the people of Virginia for the next

ten years. Whatever this Court decides in this case, the Commission will follow Virginia law and this Court's decision.

BACKGROUND AND HISTORY OF THE COMMISSION

An amendment to the Virginia Constitution must be approved by the General Assembly and Virginia voters. Va. Const. art. XII, § 1. Until recently, the General Assembly was responsible for the redistricting process. In 2019, the General Assembly voted to amend the Virginia Constitution to create a “redistricting commission [that] would be responsible for creating a redistricting plan for presentation to the General Assembly, which would then vote on the plan.” *Goldman v. State Bd. of Elections*, No. 201067, 2020 WL 5498497, at *1 (Va. Sept. 9, 2020) (unpublished). It then referred the proposed amendments to the 2020 General Assembly, which approved them and submitted them to the people of Virginia. Ch. 1071, 2020 Va. Acts. The voters approved the amendments by a wide margin, and the Virginia Redistricting Commission was created.

The newly created Commission is comprised of “sixteen commissioners,” eight citizen members and eight legislators. Va. Const. art. II, § 6-A(b). Of the legislative members, two are drawn from the

Senate representing the majority party, and two from the “political party having the next highest” membership in the Senate. *Id.* § 6-A(b)(1)(A)–(B). Similar rules govern the four commissioners drawn from the House of Delegates. *Id.* § 6-A(b)(1)(C)–(D).

The other eight commissioners are “citizen members.” *Id.* § 6-A(b)(2). They too are selected in a bipartisan manner. The Speaker of the House and the President pro tempore of the Senate each submit a list. From each list, two citizen commissioners are chosen by the five retired judges serving on the Redistricting Commission Selection Committee. *Id.* § 6-A(b)(2)(B). The leaders of the “political party having the next highest number of members” in both the House and the Senate also submit lists. Here again, two members are chosen from each list by the Selection Committee. *Id.*

The Commission is obliged to work quickly: The Constitution requires it to submit (1) its plans for districts for the Virginia Senate and House of Delegates within 45 days of its receipt of census data and (2) its plans for congressional districts within 60 days of its receipt of census data or by July 1, “whichever occurs later.” *Id.* § 6-A(d). Those deadlines are rapidly approaching. The United States Census Bureau released its

2020 census data, more than four months late, on August 12, 2021. On August 26, 2021, the Commission received census data from the Division of Legislative Services, after the Division reformatted the data for redistricting purposes and adjusted the data to reallocate prisoner populations pursuant to Virginia Code § 24.2-314.

The Commission’s structural bipartisanship continues throughout the redistricting process. Commission plans must be approved by a supermajority, where any such plan requires the approval of at least six of the eight citizen members. Va. Const. art. II, § 6-A(d). Further, each individual plan then has its own requirements. First, the proposed plan for the United States House of Representative districts must be approved by six of the eight legislative members. *Id.* § 6-A(d)(1). Next, the Senate district plan must be approved by six legislative members, including three of the four Senate members. *Id.* § 6-A(d)(2). And finally, the House of Delegates district plan must be approved by six legislative members, including at least three of the four Delegate members. *Id.* § 6-A(d)(3).

Once the Commission has approved plans, they are “embodied in and voted on [by the General Assembly] as a single bill.” *Id.* § 6-A(e). Emphasizing the Commission’s important role in the redistricting

process, the General Assembly may not attempt to amend the plans at this stage. Rather, the plans are subject to a simple up or down vote. *Id.* If the proposed plans are not accepted as is, they are sent back to the Commission, where the process begins anew.

To date, each provision of the new amendments is working as expected. The bipartisan Commission has formed, and the Commission received census data from the Division of Legislative Services on August 26, 2021. It is engaged in the redistricting process even now. This Court's swift resolution of this case will help to ensure that the Commission can finish its work on time.

ARGUMENT

The Commission takes no position with respect to the Petition for Mandamus. The Commission determined that opposing or supporting the petition would be in tension with its bipartisan nature and purpose. Instead, the Commission urges this Court to resolve this mandamus proceeding quickly to ensure that the Commission can complete its work within the governing timelines.

A. The Commission Takes No Position in This Case.

At its August 23, 2021 meeting, the Commission made a considered decision to take no position on the legal questions raised in the petition. The Commission is a bipartisan body, and in the spirit of bipartisanship the Commission determined that it would not take one side or the other in this case. Thus, while individual Commission members may have their own views on the legal issues raised by the petition, the Commission has decided to remain completely neutral.

The Commission emphasizes that its decision to take no position should not be interpreted as a sign that it lacks interest in this case. To the contrary, this case will decide how the Commission fulfills its mandate, and the Commission is keenly interested in its outcome. The Commission simply decided not to take a position in light of its bipartisan mission.

Although the Commission takes no position, the Court will still receive the benefit of adversarial presentations because the Office of the Attorney General has informed counsel for the Commission that it intends to file an opposition to the petition on behalf of the other

Respondents, *i.e.*, the Virginia State Board of Elections and the Virginia Department of Elections.

B. Because the Virginia Constitution Sets Tight Deadlines on the Commission’s Work, This Court Should Act Quickly.

The Commission urges this Court to resolve this petition quickly. The Virginia Constitution requires the Commission (1) to submit its plans for districts for the Virginia Senate and House of Delegates within 45 days after the receipt of census data and (2) to submit its plans for congressional districts within 60 days after the receipt of census data or by July 1, “*whichever occurs later.*” Va. Const. art. II, § 6-A(d) (emphasis added).¹ Although the Census Bureau was supposed to release its census

¹ The Commission notes that the Virginia Code conflicts with the language of the Constitution italicized above. The Code provides: “The Commission shall submit to the General Assembly plans for districts for the United States House of Representatives no later than 60 days following the receipt of census data or by the first day of July of that year, *whichever occurs first.*” Va. Code § 30-397(B) (emphasis added). The (mostly) parallel constitutional provision states “*whichever occurs later.*” Va. Const. art. II, § 6-A(d) (emphasis added). Given this conflict between the Constitution and Code, the Constitution controls. *Button v. Day*, 208 Va. 494, 503 (1968). Therefore, the Commission’s understanding is that its congressional plans are due within 60 days after its receipt of census data or by July 1, whichever occurs later. The Census Bureau did not release its 2020 census data until August 12, 2021. Thus, it would have been impossible for the Commission to submit its congressional plans by July 1 of this year.

data by April 1, 2021, *see* 13 U.S.C. § 141(c), it did not do so until August 12, 2021. On August 26, 2021, the Commission received the census data from the Division of Legislative Services after the Division reformatted the data for redistricting purposes and adjusted the data to reallocate prisoner populations pursuant to Virginia Code §§ 24.2-304.04(9) and 24.2-314(A), (D) (two of the statutes at issue here). At its meeting on August 16, 2021, the Commission determined that the 45-day and 60-day periods for completing maps would begin when it actually was in receipt of the census data, reformatted and adjusted from the Division of Legislative Services. The Commission received the census data on August 26, 2021 and thus, at the time of this filing, the Commission is already approximately one week into the short time-period for completing its maps. Every day that passes is another day that the Commission operates under the uncertainty of how this Court's resolution might affect its redistricting work.

The Commission wishes to emphasize that it will faithfully follow Virginia law as interpreted by this Court. A swift resolution of the current controversy is in the best interest of all concerned, including the Commission and the citizens of this Commonwealth. *See Roanoke v.*

Sutherland, 159 Va. 749, 760 (1933) (Hudgins, J., dissenting) (“Certainty in the law is highly desirable; uncertainty deplorable, and tends to endless confusion.”). This Court’s answer to the questions presented by the petition, whatever it may be, will help the Commission undertake the enormously important task of redrawing Virginia’s electoral districts.

CONCLUSION

The Commission takes no position on the legal issues raised in the petition, but will follow this Court’s decision and Virginia law. Whatever this Court may decide, however, it should act quickly, to allow the Commission to meet the task before it and submit its maps by the deadlines imposed by the Virginia Constitution.

Respectfully submitted,

/s/J. Gerald Hebert

J. GERALD HEBERT
Virginia State Bar No. 38432
J. GERALD HEBERT PC
191 Somerville Street, #405
Alexandria, VA 22304
Tel: (703) 628-4673
Fax: (202) 736-2222
hebert@voterlaw.com

/s/H. Christopher Bartolomucci

H. CHRISTOPHER BARTOLOMUCCI
Virginia State Bar No. 37884
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Tel: (202) 787-1060
Fax: (202) 776-0136
cbartolomucci@schaerr-jaffe.com

KAREEM CRAYTON
CRIMCARD CONSULTING SERVICES
6925 Oakland Mills Road, #613
Columbia, MD 21045
Tel: (334) 245-9763
Fax: (859) 780-5850
kareem@crimcardconsulting.com
(*Pro hac vice* admission pending)

BRYAN P. TYSON
TAYLOR ENGLISH DUMA, LLP
1600 Parkwood Circle, Suite 200
Atlanta, GA 30339
Tel: (678) 336-7249
Fax: (770) 434-7376
btyson@taylorenglish.com
(*Pro hac vice* admission pending)

Counsel for The Virginia Redistricting Commission, Senator George L. Barker, Senator Mamie E. Locke, Senator Ryan T. McDougle, Senator Stephen D. Newman, Delegate Les R. Adams, Delegate Delores L. McQuinn, Delegate Margaret B. Ransone, Delegate Marcus B. Simon, Co-Chair Mackenzie K. Babichenko, Co-Chair Greta J. Harris, Commissioner James Abrenio, Commissioner Jose A. Feliciano, Jr., Commissioner Richard O. Harrell, III, Commissioner Brandon Christopher Hutchins, Commissioner Sean S. Kumar, and Commissioner Virginia Trost-Thornton

SEPTEMBER 1, 2021

CERTIFICATE OF WORD COUNT

I certify that this brief complies with the relevant word-limit requirements because it is comprised of only 1,741 words.

/s/H. Christopher Bartolomucci
H. Christopher Bartolomucci
Virginia State Bar No. 37884

September 1, 2021

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2021, pursuant to Rule 5:1(B)(c), a true and correct copy of the foregoing Response Brief for the Virginia Redistricting Commission and Its Sixteen Members was served on all parties to this action via email at the same time it was filed with this Court via its electronic record filing system (VACES).

/s/H. Christopher Bartolomucci
H. Christopher Bartolomucci
Virginia State Bar No. 37884